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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 282

ST. LOUIS AMUSEMENT COMPANY, ST. LOUIS AMBASSADOR THEATRE, INC., EDEN THEATRE COMPANY, ST. LOUIS MISSOURI THEATRE, INC., FANCHON & MARCO SERVICE CORPORATION, JAMES H. ARTHUR, DAVID G. ARTHUR, EDWARD B. ARTHUR, THOMAS G. ARTHUR, HARRY C. ARTHUR, III, EDWARD L. MURPHY,

—v.— *Petitioners,*

PARAMOUNT FILM DISTRIBUTING CORPORATION, RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, AMERICAN ARBITRATION ASSOCIATION, HAROLD D. CONNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENTS, AMERICAN ARBITRATION ASSOCIATION AND HAROLD D. CONNER

S. MAYNER WALLACE,
Counsel for Respondents, American Arbitration Association and Harold D. Conner.

WESLEY A. STURGES,
EDWIN FOSTER BLAIR,
Of Counsel.

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Opinions Below

The opinion of the Court of Appeals for the Eighth Circuit (R. 315-323) is reported in 168 F. (2d) 988. The opinion of the District Court (R. 245-253) is reported in 61 F. Supp. 854.

Jurisdiction

Presumably the jurisdiction of this Court is invoked pursuant to §1254(1), United States Code, new Title 28. The petition for a writ of certiorari was filed on September 16, 1948.

Statement of the Case

This action by petitioners under the Sherman Anti-Trust Act, 15 U. S. C. A. §1 *et seq.*, was brought in the United States District Court for the Eastern District of Missouri. On motion of the respondents the District Court granted summary judgment against the petitioners, and this judgment has been unanimously affirmed by the Court of Appeals for the Eighth Circuit.

In substance, the petitioners' complaint alleged a combination and conspiracy and predicated the same solely upon the actions of respondents in complying with the arbitration provisions of a certain Consent Decree entered on November 20, 1945, by the United States District Court for the Southern District of New York, in Civil Action No. 87-273 entitled *United States of America* v. *Paramount Pictures, Inc., et al.* (R. 4; 28). This Court in 334 U. S. 131 recently considered the contested decree subsequently arising out of that litigation.

The petitioners' complaint herein concerns those provisions of the above mentioned Consent Decree dealing with the establishment of an arbitration system on matters of "clearance", which is the period of time which must elapse between runs of the same motion picture within a particular area or in specified theatres. The petitioners, who operate theatres in St. Louis, Missouri, alleged in their complaint that respondents by refusing to license films in particular cases other than on the basis of awards made by respondent American Arbitration Association entered into a combination in violation of the Sherman Act.

Respondent American Arbitration Association was appointed Administrator of the arbitration system established by the Consent Decree. As authorized by Subsection 2 of Section XXII of the Decree (R. 51), respondent Harold D. Conner was appointed by the Association as Clerk of the Motion Picture Arbitration Tribunal for the St. Louis Arbitration District. Petitioners claim that respondents American Arbitration Association and Conner by consenting to receive complaints from exhibitors on clearance questions and to make awards on such complaints, took part in the alleged combination.

The basic issue raised by the respondents' motions for summary judgment was whether they could be subjected to suit under the Sherman Act where the only acts in the alleged conspiracy consisted of their doing and arranging and agreeing to do exactly the things which they were authorized, and indeed directed, to do by the Consent Decree.

The motions of respondents for summary judgment were granted by the District Court on the ground that the Consent Decree was a valid subsisting decree and that as a matter of comity and of the orderly administration of jus-

tice that Court would refuse to review the decree of a court of coordinate jurisdiction (R. 245).

The Court of Appeals for the Eighth Circuit unanimously affirmed the judgment of the District Court on the basis that the agreement by respondents to the setting up of an arbitration system under the Consent Decree and their commitment in that Decree to abide by any final award in an arbitration proceeding conducted under that system, did not constitute a violation of the Sherman Act. In its opinion the Court of Appeals relied extensively upon the opinion of this Court in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 176.

The matter on which review is sought herein presents no question of public importance and involves no point in the administration or interpretation of the anti-trust laws which has not already been fully passed upon by this Court. In fact, as is indicated in the opinion of the Court of Appeals for the Eighth Circuit, that Court's decision was based on this Court's recent opinion in *United States* v. *Paramount Pictures, Inc., supra.*

Summary of Argument

The Consent Decree entered by the United States District Court for the Southern District of New York was a valid exercise of judicial power, and any question of its validity is now foreclosed by this Court's decision in *United States* v. *Paramount Pictures, Inc., supra.* If the full purport of this Court's decision in the *Paramount Pictures* case is to be realized, then it follows that the actions of the respondents within the framework of the Consent Decree constitute no actionable wrong under the Sherman Act.

This action, brought in defiance of the rules of comity, constitutes a collateral attack upon the validity of a decree

of a court of coordinate jurisdiction and cannot be maintained.

The United States is an indispensable party to the action and was not joined as a party defendant. The Consent Decree here under attack was the result of a suit brought by the United States to enforce the federal anti-trust laws and was entered pursuant to agreement with, and on motion of, the United States. The United States, therefore, had a primary and vital concern in the operation of the Consent Decree not only because it was a party thereto, but also because such Decree constituted an instrument of the Government for the enforcement and administration of the federal anti-trust laws.

ARGUMENT

I

The Consent Decree entered by the United States District Court for the Southern District of New York was a valid exercise of judicial power.

In the light of this Court's decision in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, it cannot be disputed that the Consent Decree attacked herein was a valid judicial act. The basis of the petitioners' case is the allegation that the Consent Decree was void. The Court of Appeals for the Eighth Circuit awaited the decision of this Court in the *Paramount Pictures* case and then summarily disposed of petitioners' claims by reference to this Court's opinion in that case.

Petitioners make no claim that the District Court for the Southern District of New York, in entering the Consent Decree, did not have jurisdiction of the subject matter and of the parties. The use of consent decrees as a valid instrument in the administration of the anti-trust laws has long been established. When a court, with jurisdiction of the subject matter and of the parties, enters a consent decree, even gross error does not render such decree void. *Swift & Company* v. *United States*, 276 U. S. 311, 330. The validity of the Consent Decree here under consideration cannot, therefore, be questioned.

With the validity of the Consent Decree established, the validity of the arbitration system and of the actions of the participants under and in accordance with the terms of that Decree is a matter on which there should be no dispute. Far from being considered invalid, the arbitration system

has been approved by all courts concerned as an efficient and useful means of settling clearance disputes among exhibitors of motion pictures.

Although the arbitration system under the Consent Decree was, of course, "an auxiliary enforcement procedure" which was terminated by the final decree in *United States* v. *Paramount Pictures, Inc.*, 60 F. Supp. 323 (D. C., S. D. N. Y., 1947), because of the failure of certain of the parties to consent to its continuance, the three-judge statutory court strongly recommended that "some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the advantages of the tribunals created by the Consent Decree" (70 F. Supp. 53, 76). That Court also stated (60 F. Supp. 323, 333) that the arbitration system had been of "demonstrated usefulness", and, in its Findings of Fact (70 F. Supp. 53, 76), characterized the system as having been conducted with "rare efficiency", particularly in the handling of clearance matters. This Court also indicated its approval of the system and, at the present time, the question of its establishment on a permanent basis is being considered by the statutory three-judge court in the Southern District of New York under this Court's remand of the case (334 U. S. 131, 176).

Under the Consent Decree the respondents American Arbitration Association and Harold D. Conner had limited authority in settling clearance disputes, and there is no question of their having imposed arbitration on any one without his consent. As to their function within the arbitration system, Section VIII of the Decree (R. 36) defined their power as follows:

> "The power of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the clearance complained of is

unreasonable; and, if the finding be in the affirmative, (2) an award fixing the maximum clearance between the theatres involved which may be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration."

In acting within the framework of the Decree—and there is no claim that they acted otherwise—these respondents were operating under the mandate of the United States District Court for the Southern District of New York. The petitioners claim that the respondent distributors by refusing to license petitioners except in accordance with an arbitration award subjected themselves to penalties under the Sherman Act. However, the action of respondent distributors under the Decree could not constitute actionable wrong under the Sherman Act. In fact, if they had licensed petitioners in violation of an arbitration award they would have subjected themselves to possible contempt proceedings under the Decree. Likewise the actions of the respondents American Arbitration Association and Harold D. Conner as ministerial agents of the New York District Court under the Decree could not constitute any actionable wrong, and the decision of this Court in the *Paramount Pictures* case fully supports this conclusion.

II

The action was brought in defiance of the rules of comity.

A further ground for the decision below was that relied on by the District Court, namely that this action was improper, since it had been brought in the Eastern District of Missouri in defiance of the rules of comity, which forbid a court from passing upon a valid decree rendered by a court of coordinate jurisdiction within the federal judicial system. Such collateral attack as was here attempted upon the validity of a decree of such a court of coordinate jurisdiction cannot be maintained.

The principle of comity requires that a court should, in furtherance of orderly process in the administration of justice and the conclusion of litigation, give effect to the judicial decisions of another court of coordinate jurisdiction. *United States ex rel. Skinner & Eddy Corporation* v. *McCarl*, 8 F. (2d) 1011 (Ct. of Appeals, Dist. Columbia, 1925); *Refior* v. *Lansing Drop Forge Co.*, 134 F. (2d) 894 (CCA 6th, 1943); *Carbide & Carbon Chemicals Corporation* v. *United States Industrial Chemicals, Inc.*, 140 F. (2d) 47 (CCA 4th, 1944).

In *Torquay Corporation* v. *Radio Corporation of America*, 2 F. Supp. 841 (D. C., S. D. N. Y., 1932), the Court declined jurisdiction on the basis of this principle because the relief sought would, if granted, be equivalent to a modification of the consent decree theretofore entered by a different federal court.

This established rule was correctly applied in this case by the District Court, since respondents in bringing this action were in effect attempting to use the District Court

for the Eastern District of Missouri as an appellate court to review a decree of the District Court for the Southern District of New York. No such powers of review have, of course, been vested in any federal district court by the Constitution or by any law of the United States.

III

The United States, an indispensable party to this action, was not joined as a party defendant.

Still another ground for the decisions below, which neither lower court found it necessary to mention, is that the District Court lacked jurisdiction over this action because the United States was an indispensable party thereto and was not joined as a party defendant.

The Consent Decree here under attack was the result of a suit brought by the United States to enforce the federal anti-trust laws, and the Decree specifically recites that it was entered pursuant to agreement with, and on motion of, the United States (R. 29). The United States, therefore, had a primary concern in the continued operation of the Consent Decree, not only because it was a party thereto, but also because such Decree constituted an instrument of the Government for the enforcement and administration of the anti-trust laws. See *Torquay Corporation* v. *Radio Corporation of America, supra.*

No party in the instant action is authorized or competent to assert or defend the interest of the United States in the Consent Decree. The United States was, therefore, an indispensable party here.

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,

S. Mayner Wallace,
Counsel for Respondents,
American Arbitration Association
and Harold D. Conner.

Wesley A. Sturges,
Edwin Foster Blair,
Of Counsel.